

BRB No. 03-0340

DOROTHY DELEO)	
(Widow of PATRICK DELEO))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
AC & S, INCORPORATED)	DATE ISSUED: <u>Jan. 30, 2004</u>
)	
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alice M. Craft,
Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry & Neusner), Groton, Connecticut, for claimant.

L. Johnson Sarber, III and Sonya H. Hoener (Marks Gray, P.A.),
Jacksonville, Florida, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2001-LHC-0542) of Administrative Law Judge Alice M. Craft rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant's husband, the decedent, worked primarily as a pipe fitter and as an insulator out of a union hall. He retired in 1976 following a heart attack. He died on

September 29, 1997, due to complications of mesothelioma of the right lung, having been exposed to asbestos in his employment. Claimant sought survivor's benefits and funeral expenses under the Act. 33 U.S.C. §909.

The administrative law judge found that an employment relationship existed between the decedent and employer at various times between 1967 and 1976, and that the last project the decedent worked on with employer was at a Chevron facility in New Jersey.¹ The administrative law judge found, however, that the decedent was employed in new construction work at the Chevron refinery, that the refinery was approximately one mile away from the pier, and that the refinery was not directly connected by pipelines to the pier. Thus, the administrative law judge concluded that the decedent's work site was not a covered situs under the Act. 33 U.S.C. §903(a). In addition, the administrative law judge found that the decedent was involved in the construction of pipelines at the refinery, and not in the pipelines used in the unloading of crude oil on the pier. Thus, she concluded that decedent was also not engaged in employment covered under the Act. 33 U.S.C. §902(3).

On appeal, claimant contends that the administrative law judge erred in finding that the decedent's work for Chevron did not occur on a covered situs, as there was testimony that the decedent also worked directly on the docks with the pipelines which ran between the ships and the refinery. In addition, claimant contends that the decedent's work maintaining the pipes which moved the crude oil from the ships to the refinery is covered employment as it is part of the unloading process. Employer responds, urging affirmance of the administrative law judge's decision.

For a claim to be covered by the Act, a claimant must establish that the injury occurred upon the navigable waters of the United States, including any dry dock, or on a landward area covered by Section 3(a), and that his work is maritime in nature and is not specifically excluded by a provision of the Act. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that coverage exists, a claimant must satisfy the "situs" and "status" requirements of the Act.

¹ Decedent previously worked for employer at the Hess Oil and Exxon refineries. However, the only evidence claimant presented of potentially covered employment is the testimony of Thomas Mulligan, a former co-worker of decedent, who testified regarding the work at the Chevron facility.

Claimant initially challenges the administrative law judge's finding that decedent's work at the Chevron facility was not on a covered situs. Section 3(a) states:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a). Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Constr. Co.*, 26 BRBS 97 (1992). To be considered a covered situs, a landward site must be either one of the sites specifically enumerated in Section 3(a) or an "adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. §903(a).

The administrative law judge found that the evidence establishes that decedent's construction work was performed entirely on the refinery site at the Chevron facility, rather than partially on the facility's dock as asserted by claimant. She found that decedent's work occurred only at the refinery, a "manufacturing facility" which was one mile away from the pier, and that no loading, unloading, building or repairing of vessels took place at the refinery. Decision and Order at 13-14.

Claimant contends that the testimony of Thomas Mulligan establishes that the decedent insulated pipes which were on the pier at the Chevron facility and that the testimony of employer's witnesses establishes that pipes led directly from the ships to the refinery. Mr. Mulligan worked for approximately 40 years with the pipefitters union, including working on numerous jobs with the decedent. He testified that he worked at the Chevron facility with the decedent and that they applied insulation to piping equipment. He testified that some of the decedent's duties at the Chevron facility included insulation maintenance work on pipes which connected the ships directly to the refinery. Mr. Mulligan also testified that it was possible that the decedent had worked on the pipes at the pier. H. Tr. at 54-55. The administrative law judge found that Mr. Mulligan's testimony was outweighed by the contrary deposition testimony of employer's representatives, Joseph Checkovich, an estimator trainee during the time at issue, and George Kelley, a construction superintendent during the Chevron project. The administrative law judge found that Mr. Kelley and Mr. Checkovich provided corroborative descriptions of the Chevron facility and exhibited a thorough understanding of employer's contractual obligations and its employees' corresponding job duties at the

site for the project. Mr. Checkovich stated that employer's workers were insulating equipment and instruments in the refinery location. Emp. Ex. 10 at 5-6. Contrary to claimant's contention that Mr. Checkovich "admitted" that oil would be pumped through the pipes on the docks to the refinery, he explained that when oil is unloaded from a ship, it goes through pipe into a holding tank, and from the tank, it is pumped to the refinery to be broken down.² *Id.* at 8. He also explained that the three-tiered pipe rack which was described by Mr. Mulligan is located in the refinery itself and not in the pier area. *Id.* at 12. Mr. Kelley testified that employer's workers were insulating pipes at the refinery for the refinery process. Emp. Ex. 9 at 11. He stated that there were no pipes that ran directly from the refinery to ships docked at the pier. *Id.* at 9.

The administrative law judge weighed the evidence and found the testimony of Mr. Kelley and Mr. Checkovich to be more detailed and thorough, and thus more persuasive than Mr. Mulligan's testimony. Questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961), and it is solely within the administrative law judge's discretion to accept or reject all or any part of any witnesses' testimony. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). As claimant has raised no reversible error in the administrative law judge's weighing of the evidence regarding the site of decedent's work at the Chevron facility, we affirm the administrative law judge's finding that claimant's work was confined to the refinery as it is supported by substantial evidence.

Moreover, the administrative law judge's finding that the refinery site is not a covered situs comports with law. The Board has held that those portions of an employer's facility where loading and unloading occurs are covered under the Act; however, the portions devoted to the manufacturing process are not covered, as the function of that area is not related to loading, unloading, repairing or building vessels. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *see also Bianco v. Georgia Pacific Corp.*, 35 BRBS 99 (2001), *aff'd*, 304 F.3d 1053, 36 BRBS 57 (CRT)(11th Cir. 2002)(manufacturing plant not used for maritime purposes); *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003)(facility contained distinct areas used for loading and unloading and for non-maritime manufacturing purposes); *see generally Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (1980), *cert. denied*, 452 U.S. 905 (1981)(to be covered, site must have both geographic and functional nexus to navigable waters).

² In addition, Mr. Checkovich also stated that the crude oil was brought in by ships and would be piped to the refinery, eventually. Emp. Ex. 10 at 16.

The administrative law judge found that the refinery at the Chevron facility was approximately one mile away from the waterfront. She also found that while ships unload crude oil via pipes onto the docks at the Chevron facility, the evidence does not establish that these pipes lead directly to the refinery. Rather, the administrative law judge found that employer's representatives stated that the crude oil was unloaded via pipes to a holding tank prior to being pumped to the refinery for processing, Emp. Ex. 10 at 8, and that the decedent did not work on this portion of the project. *Id* at 5-6. Thus, the administrative law judge concluded that the refinery was not used in the loading and unloading process, but was used in the first step of "manufacturing" the crude oil, and thus was not a covered situs. Moreover, the administrative law judge found that the crude oil was transported through other facilities prior to being moved to the refinery for processing. These findings are supported by substantial evidence, and therefore, we affirm the administrative law judge's finding that the refinery at the Chevron facility was similar to a manufacturing plant in that it was used to process stored crude oil. Consequently, as the administrative law judge credited the testimony of employer's representatives who stated that decedent worked exclusively at the refinery, we affirm the administrative law judge's finding that the decedent's exposure to asbestos did not occur on a covered situs. *Jones*, 35 BRBS at 43; *Bianco*, 35 BRBS at 103; *Maraney*, 37 BRBS at 101.

Moreover, we also affirm the administrative law judge's finding that decedent was not a covered employee under the Act. 33 U.S.C. §902(3). The administrative law judge found that the decedent was employed in the construction of the new refinery at the Chevron facility. She concluded that because the decedent's job duties were limited to insulating pipes used in the refining process, his work was not essential to the crude oil unloading process that occurred on the pier. The administrative law judge noted that the Supreme Court has held that workers "who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act," *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96, 99(CRT) (1989), but concluded that decedent was not such an employee.

The administrative law judge's finding that decedent's duties were not related to loading and unloading but to the refinery process is supported by the credited evidence. Moreover, even where a facility has a potential future use in maritime activities, work in its construction is not covered. In *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) (4th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995), the United States Court of Appeals for the Fourth Circuit held a pipefitter who was injured during the construction of a power plant on the Norfolk Naval Base was not a covered employee. The court held that the claimant was a construction worker whose work was not maritime inasmuch as his connection to maritime employment was merely that power from the plant he helped to build would eventually be used by the shipyard, concluding that this

connection Abarely extended beyond >breathing salt air.=@ *Prevetire*, 27 F.3d at 990, 28 BRBS at 62(CRT). The court further noted that claimant=s construction duties were the same regardless of the location of the power plant. *Id.* Relying on the Supreme Court=s decision in *Herb=s Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), the Fourth Circuit stated that Prevetire=s work, like Gray=s,³ was not Aan integral or essential part of loading or unloading a vessel.@ *Prevetire*, 27 F.3d at 989, 28 BRBS at 62(CRT). In comparing the two cases, the court stated that Gray had an even stronger connection to maritime employment than did Prevetire, yet he did not meet the status requirement; thus, as ACongress did not intend to extend LHWCA coverage to every employee who works at a shipyard regardless of whether the work is maritime employment,@ the court held that Prevetire was not a covered employee. *Id.*, 27 F.3d at 989-990, 28 BRBS at 62(CRT), *see also Southcombe v. A Mark, B Mark, C Mark Corp.*, BRBS , BRB No. 03-261 (Dec. 12, 2003); *Moon v. Tidewater Constr. Co.*, 35 BRBS 151 (2001)(the Board affirmed the administrative law judge’s finding that claimant, who was responsible for setting concrete form of outside wall of a new warehouse, was not a covered employee). The instant case is similar to *Prevetire*, in that claimant was engaged in construction work at a new facility, and its ultimate maritime use is even more tenuous than that in *Prevetire*.

The administrative law judge rationally credited employer’s representatives who stated that the decedent’s duties were to insulate the pipes and equipment at the new construction for the refinery, which had no connection to the unloading of crude oil, she properly found decedent was not covered under Section 2(3).⁴ Therefore, we affirm the

³ Gray worked as welder on an offshore drilling platform, building and replacing pipelines and doing general maintenance work. He was injured while welding a gas flow line. The Supreme Court held that offshore drilling is not inherently maritime,@ and Gray was not covered. *Gray*, 470 U.S. 414, 17 BRBS 78(CRT).

⁴ Thus, the line of cases in which the claimants worked on pipelines which were directly used to load and unload ships and were found to be covered employees is inapplicable in the instant case. *See, e.g., Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, *reh’g denied*, 910 F.2d 1179 (3^d 1990), *cert. denied*, 498 U.S. 1067 (1991)(court held that a claimant satisfied the status requirement where his job involved connecting and disconnecting hoses through which fuel was pumped to ships, and subsequently flushing those hoses); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff’d sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994)(a welder who worked on replacing old pipelines in a trench that ran along a pier was a covered employee). In this case, claimant’s work occurred after the point where the loading process had ended and the work of the refinery had begun.

administrative law judge's finding that the decedent was not a covered employee under the Act.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge